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Original citation:
Mitchell, B. 'Loss of self-control under the Coroners and Justice Act 2009: oh no!', in *Loss of Control and Diminished Responsibility* eds. Alan Reed and Michael Bohlander (Farnham: Ashgate, 2011), pp. 39–50. Copyright © 2011

http://www.ashgate.com/isbn/9781409431756

Chapter 3

Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!

Barry Mitchell

Introduction

On 4 October 2010 sections 54 to 56 of the Coroners and Justice Act 2009 came into force, replacing the partial defence of provocation with loss of self-control.[1] Where it is pleaded successfully the defendant's liability is reduced from murder to voluntary manslaughter.

The old common law plea of provocation had been subjected to considerable criticism over many years. It was reviewed by the Law Commission between 2003 and 2004, at the end of which the Commission recommended that it be 'reformed' so that it would arise where 'the defendant acted in response to (a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or (b) fear of serious violence towards the defendant or another; or a combination of (a) and (b); and a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or similar way'.[2]

The Commission then undertook a wider review of the homicide law between 2005 and 2006, and reiterated its reformed definition of provocation, the effect of which should reduce murder in the first degree to murder in the second degree.[3]

The then New Labour government's response to the Law Commission's recommendations was very limited. It ignored those more fundamental proposals which referred to the structure of the substantive law, but through the Coroners and Justice Act 2009 it has effectively revised the provocation plea and renamed it 'loss of self-control'. Under s. 54(1) the accused has a defence to murder if his acts or omissions resulted from a loss of self-control which itself had a 'qualifying trigger', and (adopting some of the Law Commission's wording) 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or similar way to D'. By virtue of s. 55 a qualifying trigger must be either 'D's fear of serious violence from V against D or another identified person', and/or 'a thing or things done or said (or both) which (a) constituted circumstances of an extremely grave character, and (b) caused D to have justifiable sense of being seriously wronged'. A plea of loss of self-control will fail if the trigger had been incited by the defendant,[4] and – somewhat controversially – sexual infidelity is expressly excluded as a sufficient basis for the defence.[5]

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1 The plea is labelled 'loss of control' in s. 54, but contents of the section clearly refer to 'loss of self-control'.

2 Law Commission, *Partial Defences to Murder* (Law Com. No 290, 2004) para. 3.168.

3 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No 304, 2006) paras 9.16 and 9.17.

4 Coroners and Justice Act 2009, s. 55(6)(a) and (b).

5 Ibid., s. 55 (6)(c).

The defence must be left for the jury to decide if 'sufficient evidence is adduced to raise an issue with respect to the defence … on which, in the opinion of the trial judge', they could, properly directed, 'reasonably conclude that the defence might apply'.[6] If the matter is left to the jury, they 'must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not'.[7]

The new loss of self-control plea is similar to the old common law which it replaces in that it requires defendants to comply with both subjective (viz. a loss of self-control triggered by – in crude terms – fear or anger) and objective (the person of normal tolerance etc.) tests. The focus of this chapter, however, is very much on the concept of loss of self-control which clearly lies at the very heart of the plea.

Common Law Provocation – Especially the Loss of Self-Control Requirement

Unlike diminished responsibility, which is a relative newcomer to English criminal law,[8] the other plea which most commonly reduces murder to voluntary manslaughter,[9] provocation, had long been recognised, having emerged (albeit in a much narrower form) in the seventeenth century.[10] The basis of the law at the time it was repealed was set out in the judgment of Devlin J in *Duffy*[11]; the law called for 'some act, or series of acts, done by the dead man to the accused, which would cause in a reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind'. This common law concept was modified by s. 3 of the Homicide Act 1957 which stated that the provocation must be something done and/or said: in other words, the trigger had to be some form of human action. The *Duffy* definition was further expanded by case law – the provocation did not have to emanate from the victim,[12] and it did not have to be directed at the accused.[13]

But at its heart there had to be a sudden and temporary loss of self-control, and this requirement proved highly controversial. It should be acknowledged at the outset, however, that the law was not always thus. Over the years the courts adopted various epithets in an attempt to illustrate the nature of the law, and they often pointed not so much to the physical dimension of the defendant's reaction, but to his state of mind. For example, in *Hayward*, Tyndal CJ directed the jury to consider whether there had been time (between the provocation and the defendant's fatal assault) 'for reason to resume its seat'.[14] The ruling in *Duffy* clearly also refers to the impact on the accused's mental state – he must no longer be 'master of his mind' – as well as the physical dimension.

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6 Ibid., s. 54(6).

7 Ibid., s. 54(5).

8 It was first recognised in s. 2 of the Homicide Act 1957.

9 It is extraordinarily difficult to quantify the number of cases in which a provocation defence succeeded because the government statistics did not quantify them as a separate category – they merely distinguished between diminished responsibility and 'other manslaughter'.

10 For interesting discussions of the historical evolution of provocation, see John Kaye, 'The Early History of Murder and Manslaughter' (1967) 83 Law Quarterly Review 365 and 569; Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 Cambridge Law Journal 292; and Jeremy Horder, *Provocation and Responsibility* (Oxford University Press, 1992).

11 [1949] 1 All ER 932 n.

12 Davies [1975] QB 691.

13 Pearson [1992] Crim LR 193.

14 (1833) 6 C&P 157, 159.

The loss of self-control requirement in common law provocation received enormous criticism. In *Richens*[15] the Court of Appeal held that it would be wrong to say that there must be a complete loss of control. Indeed, that would imply some sort of state of automatism, which would point towards a complete defence, not simply a partial reduction of liability. In simple terms, the law envisaged that the defendant should be so angry that he was unable to control his reaction, and the addition of the words 'sudden and temporary' implied that there should be a spontaneous reaction. Any evidence of premeditation or of a time interval between the provocation and the defendant's response would almost certainly undermine the defence. But there was always a conspicuous absence of any definition of loss of self-control, and it was unclear whether it meant that the accused simply failed to exercise self-control or whether it implied a basic incapacity to do so – though medical science almost certainly could not determine whether a defendant in fact suffered from such an incapacity. The fact that defendants not infrequently expressed themselves in a way which suggested they were unable to control their reactions was by no means convincing.[16]

The lack of legal definition of loss of self-control was perhaps graphically and tragically illustrated in *Cocker*,[17] a case which in many respects appeared to be one of mercy killing.[18] The defendant's wife suffered from Freidreich's ataxia, a disease which is both incurable and incapacitating. He had been caring for her for almost 11 years. She repeatedly begged him to kill her, and she became increasingly irritable. After keeping him awake for most of one night with regular pleas that he should kill her, the defendant finally gave in, put his hands around her throat and then smothered her with a pillow for about 30 seconds. He gave himself up to the police, saying it was 'the last straw'. At his trial for murder, he testified that what had prompted him to kill her was her final request for her life to be ended and that her persistent begging was simply too much for him. The trial judge and the Court of Appeal took the view that there was no evidence that he had been provoked to lose his self-control. Rather than lose his self-control, the defendant had acceded to his wife's entreaties. This seems to be based on an unfortunately narrow interpretation of loss of self-control – the defendant acted in an apparently calm and deliberate manner, rather than in an overtly uncontrolled fashion – and, especially in light of the mandatory life sentence for murder, it was a pity that the court did not feel able to bring him within Devlin J's definition on the basis that he had lost his self-restraint and that amounts to the same thing.[19]

Of course, the question of provocation only arose where there was a *prima facie* case of murder against the defendant; i.e. the defendant caused the victim's death either intending to kill or to cause serious injury. The law had long ago effectively rejected the expression used by Sir Edward Coke in the seventeenth century that murder required the accused to have killed 'with malice aforethought'. Neither malice nor forethought had to be proved: all that is necessary is that the

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15 [1993] 4 All ER 877.

16 In 2004 the Law Commission reported that their discussions with psychiatrists revealed that those who do strike out – lose their self-control – in anger can usually afford to do so. 'An angry strong man is much less likely to "lose self-control" and attack another person in circumstances in which he or she is likely to come off worse by doing so'; see Law Com. No 290, 2004 (n. 2) para. 3.28.

17 [1989] Crim LR 740.

18 Paul Taylor, 'Provocation and Mercy Killing' [1991] Criminal Law Review, 111–14, where the case is discussed in the context of an argument that there is no insurmountable reason why provocation should not have been available in some cases of mercy killing. (In practice, where a case is regarded as a genuine instance of mercy killing, the plea of diminished responsibility is likely to be construed very generously so as to lead to a manslaughter conviction and thus the avoidance of a mandatory sentence of life imprisonment.)

19 Interestingly, the concept of loss of self-restraint is used in the new law (see s. 54) and appears to be synonymous with loss of self-control.

defendant was fleetingly aware that his actions would lead to death or serious harm. But as the Law Commission reminded us, there was degree of tension between the need for such an intent and the loss of self-control requirement. As Devlin J had stated, the defendant had to have reached the point at which he was 'no longer master of his mind', yet that meant that 'in one way, [he] lacked the full *mens rea*'.[20]

One of the most critical comments arising from the loss of self-control requirement was that it revealed a gender bias in the law, that it reflected a typically male reaction to provocation, but one which women were very unlikely to display. When men are provoked they become angry and lash out in the heat of the moment, but for the reasons indicated earlier (in footnote 16) women instinctively recognise that they cannot afford to react in the same way. They have to exercise self-control, and battered women, for example, choose to give vent to their reaction by attacking him at a later time when their abuser is off guard. As the Law Commission commented, 'Women's reactions to provocation are less likely to involve a "loss of self-control", as such, and more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.'[21] A similar point was made by Professor Ormerod who wrote that the concept 'has the potential to operate in a discriminatory way, rendering the defence too readily available to those who are quick to temper (more commonly men), and less accommodating of those who endure the provoking circumstances before responding with lethal force (often women who kill abusive partners)'.[22]

In the face of this it was not particularly surprising that the courts decided to adopt a flexible approach in what came to be known as 'slow-burn' cases – i.e. there was a lengthy history of abuse against the defendant and the last incident of abuse which preceded the fatal assault was relatively modest. Seen only in that light there was a real danger that the court would reject a provocation plea and the defendant would be convicted of murder. So in cases such as *Ahluwalia*[23] the Court of Appeal held that evidence of the history of abuse, and not simply the last incident of it, was admissible – though at the same time the court reiterated that there must still be evidence that the defendant did lose her self-control.

To the extent that this enabled the defence to make the court aware of the full context in which the killing took place, this development was surely welcomed. But at the same time it proved problematic. One of the basic aims of the loss of self-control requirement was to distinguish deserving cases where the defendant had been seriously provoked and reacted spontaneously from those which were committed in considered revenge and thus undeserving of the courts' sympathy. The law's accommodation of slow-burn homicides clearly undermined this aim. The approach taken in slow-burn cases was not confined to battered spouse homicides and it effectively reduced the potential significance of any lapse of time between the provocation and the fatal assault. It surely led to some difficult situations in which juries were placed in the invidious position of having to reach a verdict where there was evidence of much provocation but also of planning and deliberation. Not only did this cause real concern for the parties to individual cases, but it also raised fears of a 'jury lottery' – the inevitable inconsistency that must have occurred through different juries reaching different verdicts. It is perhaps worth noting at this point that the author's own empirical research revealed occasions when it seems that the courts occasionally returned

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20 Law Commission, *Partial Defences to Murder* (Law Com. CP No 173, 2003) para. 4.28.

21 Law Com. No 304, 2006 (n. 3) para. 5.18.

22 David Ormerod, *Smith and Hogan: Criminal Law* (12th edn, Oxford University Press, 2008) 492, 493.

23 [1992] 4 All ER 889.

verdicts of manslaughter based on provocation even though the evidence disclosed little or no sign of a loss of self-control.[24]

Furthermore, as the Law Commission acknowledged in their 2006 report, cases sometimes reveal a mixture of motives, of which revenge is only one. In *Baillie*,[25] for example, the victim was a drug dealer who had supplied drugs to the defendant's three sons. The defendant discovered that one son intended to get his drugs from a different dealer, that the victim had learned this, and that in consequence all three sons were 'going to get a slap'. One son told the defendant, in tears, that the victim had threatened him. So the defendant armed himself with a sawn-off shotgun and a cut-throat razor, confronted the victim, cut him and shot at him. On the one hand, this could be construed as a case of revenge, but on the other hand, the defendant's actions could be construed as preventing further crime by the victim drug-dealer. Making the considered-revenge-versus-bona-fide-provocation distinction is not necessarily as straightforward as it initially seems. Predictably, therefore, commentators have criticised the law's use of the loss of self-control requirement. 'It is an imperfect tool for distinguishing between revenge killings of a premeditated or calculated nature from killings committed in the heat of the moment.'[26] Similarly, the Law Commission described it as 'a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence – that it should not be available to those who kill in considered revenge.'[27]

Aims of the New Law

The previous section of this chapter concentrated on criticisms of the loss of self-control requirement in provocation, but that was only part of the story. If anything, commentators were even more critical of the way in which the objective test – that the court must be satisfied that the defendant had done what any reasonable person would have done in the same circumstances – developed over the years. The year 1976 saw the publication in the *Cambridge Law Journal* of Professor Andrew Ashworth's seminal article in which he argued that when applying the objective test it was right that certain personal characteristics of the accused should be taken into account.[28] In other words, the objective test should be partially subjectivised. This was endorsed and given judicial support not long afterwards by the decision of the House of Lords in *Camplin*[29] where Lord Diplock stated that 'the reasonable [person] … is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him'.[30] Both Professor Ashworth and Lord Diplock sought to stress that the law should distinguish between characteristics which were the object of the provocation and those which simply relate to the defendant's ability to exercise self-control, and that only the former should be relevant to the objective test. In the event, however, there was a series of conflicting appellate court decisions in which this distinction was at times upheld and at other times ignored. By a majority of three to two the House of Lords held in

24 See Barry Mitchell, 'Distinguishing between Murder and Manslaughter in Practice' (2007) 71 Journal of Criminal Law 318–41.

25 [1995] Crim LR 739.

26 Ormerod (n. 22) 492.

27 Law Com. No 290, 2004 (n. 2) para. 3.30.

28 Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 Cambridge Law Journal 292.

29 [1978] AC 705.

30 Ibid., 718.

Smith (Morgan)[31] that the jury could take into account characteristics other than age and sex, whether or not they were relevant to the provocation in the case. But in another divided decision the Privy Council (six to three) in *AG for Jersey* v. *Holley*[32] held that *Smith* was wrongly decided and reiterated the distinction advocated by Professor Ashworth and Lord Diplock that only those characteristics relevant to the provocation should be considered when applying the objective test.[33]

Moreover, the situation became more confusing and unsatisfactory when the courts had to decide whether discreditable characteristics or characteristics which are repugnant to or inconsistent with the idea of the reasonable person might nevertheless be taken into account. In *Dryden*[34] the Court of Appeal held that obsessiveness and eccentric personality should have been taken into account. In *Humphreys*[35] the Court felt that abnormal immaturity and attention-seeking should have been left to the jury, and in *Morhall*[36] the House of Lords regarded the defendant's addiction to glue-sniffing in the same way. Quite how the jury were meant to apply these tests was never made clear!

Against this background it was not at all surprising that many commentators expressed their frustration and impatience with the law, and called for the abolition of the common law plea of provocation.[37] In their review of the law the Law Commission seemed to have two principal aims in mind – one positive and one negative. On the positive side there was a desire that the law should accommodate battered spouses who killed their abusers even though he/she acted with some degree of premeditation and there was no evidence of a loss of self-control.[38] Conversely, adopting a more negative approach, the Commission thought it right to exclude cases of considered revenge, such as honour killings.[39]

The New Loss of Self-Control

Notwithstanding the Law Commission's strong opposition to the retention of the loss of self-control requirement, the government was worried that without it there would be a real risk of undeserving cases – such as honour killings, gang-related homicides, and some battered spouse cases – continuing to benefit from the partial defence. In a consultation paper the government explained:

> there is … a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence.[40]

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31 [2000] 4 All ER 289.

32 [2005] UKPC 23.

33 Although Privy Council decisions are clearly not binding on English courts, it seems that the majority view in *Holley* has been followed by the Court of Appeal. See *Mohammed (Faqir)* [2005] EWCA Crim 1880; *Van Dongen* [2005] EWCA Crim 1728; and *James and Karimi* [2006] EWCA Crim 14.

34 [1995] 4 All ER 987.

35 Ibid., 1008.

36 [1995] 3 All ER 659. See Alan Norrie, 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 65 Modern Law Review 538.

37 See, for example, Celia Wells, 'Provocation: The Case for Abolition', Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 85–106.

38 Law Com. No 290, 2004 (n. 2) paras 3.65–3.70.

39 Law Com. No 304, 2006 (n. 3) paras 5.11–5.32. This is now given legislative force through the Coroners and Justice Act 2009, s. 54(4).

40 Ministry of Justice, *Murder, Manslaughter and Infanticide* (MoJ CP No 19, 2008) para. 36.

The point was then reinforced at the end of the consultation process: removal of the loss of self-control requirement would quite simply create too great a risk that the partial defence would become available to 'cold-blooded killing'.[41]

In contrast to the former provocation plea, the loss of self-control under the Coroners and Justice Act 2009 need not be 'sudden and temporary'. The old common law deliberately sought to reflect the idea of an explosion of anger – during which the defendant lashes out with fatal violence – which then subsides. But the effect and significance of this was weakened by the courts' willingness to show sympathy in the 'slow-burn' cases. By allowing the admission of what might be a lengthy period of abuse/provocation – i.e. the historical context – and simultaneously accepting that the instance of provocation which immediately preceded the fatal assault might be relatively trivial, the courts provided an opening for what some regarded as dubious cases. In other words, the accommodation of slow-burn cases produced what were arguably undesirable side effects.

It is difficult to think of a situation in which a loss of self-control would not be temporary, though admittedly the adjective 'temporary' did not necessarily mean that it would be as brief as the paradigmatic explosion of anger might normally imply. Nevertheless, the more interesting issue arose from the requirement of suddenness. As Ashworth remarked, this requirement had no judicial authority before *Duffy*.[42] The removal of the suddenness requirement seems to reflect a desire to accommodate slow-burn cases, which characterises some battered spouse homicides, but the loss of self-control condition – assuming it is construed in at least broadly the same fashion as under the old law – clearly represents a significant restriction on the availability of the new defence. At the same time, one commentator has hinted that removal of the suddenness requirement from the wording of the new law may not bring about much of a change. Norrie writes 'it might be thought, a test for and constitutive feature of any loss of self-control in anger is that it have an element of suddenness. How else does one identify a loss of self-control, except as a moment of departure from being in control?'[43] It will, of course, be interesting to see whether the loss of self-control under the Coroners and Justice Act is construed by the courts any differently from the subjective test in the old common law.

It is also difficult to avoid the conclusion that retention of the loss of self-control requirement does not always sit comfortably with the government's declared aims in the Coroners and Justice Act. In its response to consultation, the government welcomed the support for the partial defence to murder in cases based on a fear of serious violence, and expressly made the point that it should be available even though the violence is not imminent.[44] The problem lies most clearly in conceiving of situations in which the accused was fearful of non-imminent serious violence and yet still lost his or her self-control. The loss of self-control requirement would surely still exclude a significant proportion of battered women who kill their abusers. Moreover, in its response to a concern of a number of respondents on this very point, the government stated that a loss of self-control is not necessarily 'inconsistent with situations where a person reacts to an *imminent* fear of serious violence',[45] but made no comment where the fear is not imminent.

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41 Ministry of Justice, *Murder, Manslaughter and Infanticide* (MoJ CP (R) No 19, 2008) para. 62.

42 Andrew Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press, 2009) 253.

43 Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control' [2010] Criminal Law Review 275, 288.

44 MoJ CP No 19, 2008 (n. 40) paras 26 and 29.

45 Ibid., para. 63 (emphasis added).

Back to First Principles

As the Introduction makes clear, the emphasis in this chapter is on the concept of loss of self-control that lies at the very heart of the new law. The reason for the government's persistence with the concept is well understood, but is it well founded? This latter question can only be addressed by going back to first principles and rehearsing what happens when someone is provoked. That in itself, of course, requires some consideration of what constitutes provocation. Both the old and the new law seem to restrict it to some form of human conduct – s. 3 of the Homicide Act 1957 referred to 'things done', 'things said' or 'both together'. Given that the courts have essentially envisaged a provoked defendant as one who lashes out in anger with fatal force, and he/she is then partially excused liability because the law recognises that it was reasonable for the defendant to have reacted as he/she did,[46] it is surprising that there has been relatively little querying of the source of the provocation. One of the very few commentators on this is Professor David Ormerod who correctly suggested that loss of self-control by, for example, a farmer when his crops are destroyed by a flood would not give rise to a provocation plea. 'If D may rely on the defence where the crops … were destroyed … why should it be different where no human agency was involved? The "provocation" is no more and no less.'[47] Historically, it is perhaps understandable that provocation should be limited in this manner because the law had a much narrower concept of the plea,[48] but over the years it had clearly expanded quite considerably.

What is important is that the defendant has been emotionally disturbed by something in circumstances that the law thinks merit some attenuation of culpability. Naturally, whatever it is that triggers the defendant's reaction must be of sufficient substance to justify the emotional disturbance, but there appears to be no good reason why it should be a form of human conduct. The law's sympathy originates from the defendant's reaction and the circumstances in which it occurred, not from the source of the trigger *per se*. Examination of the old case law and of the numerous critiques (including that of the Law Commission in 2003–04) reveals a conspicuous lack of any attempt to rationalise the limitation on the source of the provocation. Ironically, the insistence that the provocation stems from human conduct makes it resemble a kind of revenge, which is something that the courts have always been very keen to distinguish.

It is perhaps useful to think about how provocation impacts on people in a fairly crude but simple way. Whatever form it takes, it must surely impact initially on the individual's mind, through one of the senses – hearing, sight, or even touch, smell, etc. Assuming there is sufficient gravity in the provocation, the individual may react to it on an emotional level in one or more ways; he/she will become angry, frightened, desperate, frustrated, etc. It is important to recognise here that emotional reactions may well be not simply reasonable but in some instances positively desirable in the circumstances. Broadly following the Law Commission's (2006) recommendations, the new law focuses on just two kinds of emotional reaction – anger and fear – and that is presumably because (a) the law has traditionally conceived of provocation as an anger-based plea, and (b) numerous concerns have been raised very publicly about the way in which the old law (failed to) accommodate battered women who were frightened by their abusers. But there appears to be no valid reason for limiting the law's sympathy to these emotions; other forms of emotional disturbance in the face of provocation are just as understandable and reasonable, and indeed many battered women experience great desperation as well as fear.

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46 English criminal lawyers in particular traditionally regarded provocation as partly justificatory.

47 Ormerod (n. 22) 49.

48 See the references in n. 10.

Loss of self-control is, of course, entirely consistent with anger, but is more difficult to reconcile with other emotional reactions. Those who are fearful may outwardly appear calm but their normal process of rational thinking is likely to be disrupted – the degree of disruption being in proportion to the extent of their fear. Such individuals are unlikely to be thinking in a calm and rational manner. (Others may, of course, be demonstrably panic-stricken.) Many people who act out of fear would not conform to the law's traditional interpretation of having lost their self-control, though it is possible that in future the courts might adopt a broader construction which would bring such individuals within the ambit of the new defence. Similar arguments apply to those who are, for example, desperate or frustrated. But whatever the nature of the individual's emotional reaction, what prompts our sympathy is the impact of the provocation/trigger on their mental processes. Referring to the loss of self-control requirement under the old provocation law, Lord Taylor (in *Ahluwalia*) explained that it 'encapsulates an essential ingredient of the defence of provocation in a clear and readily understandable phrase. It serves to underline that the defence is concerned with the actions of an individual who is not, at the moment when he or she acts violently, master of his or her own mind.'[49]

If the courts continue to construe loss of self-control in substantially the same way as they have done hitherto, then there must be serious doubt that the new law will bring about any significant reform. Significant reform could only be achieved by, at the very least, expanding the loss of self-control concept. The courts would have to recognise the importance of the mind's control over the physical action (or inaction), and the argument would be that the individual's normal thinking processes had been seriously disrupted by the provocation/trigger. In other words, the mind was not working normally and thus the physical actions were not being controlled in the usual way.[50]

The Search for a Rationale – for a 'Moral Plank'[51]

One of the constant features of commentaries on the old provocation law was the uncertainty of its rationale. The basic question, why should the law show sympathy to those who are provoked to kill, was uncomfortably difficult to answer with any great satisfaction or confidence. American commentators in particular tended to see it as essentially based on excuse. The fact that the accused had been provoked to lose his self-control justified our desire (instinct?) to show some compassion towards him, but it did not justify his act of killing another person. In this loose sense, provoked killers are in a broadly analogous position to the insane killer, though the latter's insanity has a more radical impact on his personal responsibility for killing since the verdict is 'not guilty by reason of insanity' – whereas the provoked killer's responsibility is only partially extinguished.

In contrast, some English commentators preferred to treat provocation as a mixture of excuse and justification. The loss of self-control provided grounds for excusing, but the fact that by definition the accused fulfilled the law's requirement that he had shown reasonable self-control in the circumstances evidenced an element of justification. Moral condemnation of the accused's reaction to the provocation should therefore be limited or qualified in some degree.

But the argument being made here is clearly that retention of the loss of self-control requirement is unlikely to bring about any significant reform of the law because it focuses attention on the

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49 n. 23.

50 This would require a radical change from the approach adopted in cases such as *Ibrams* (1982) 74 Cr App R 154, where the Court of Appeal specifically rejected the idea that 'impairment of judgement' is synonymous with loss of self-control.

51 This was a phrase used by the Law Commission; Law Com. CP No 173, 2003 (n. 20) para. 4.28.

wrong issue. Even assuming that it is right to insist on some form of human activity as providing the trigger, the law should concentrate on the nature and extent to which that trigger has disturbed the accused's thinking, judgement and perceptions. Obviously, the killer's liability should only be affected if the trigger has had a serious or substantial impact on his mental processes. Throughout our lives we are frequently subjected to pressures and stresses that have some influence on our state of mind but these do not and should not lessen our personal responsibility for how we behave at the time. But where the provocation has substantially disturbed the individual's thinking, etc. – and where the individual's emotional reaction was reasonable – there must surely be good grounds for reflecting that in their criminal liability. There does not appear to be – at least to the author – any obvious or readily apparent means of determining whether there has been a sufficient mental disturbance, and it does not seem to be measurable in a purely objective manner. In cases where we are likely to be sympathetic, the accused's state of mind might well be described as 'abnormal', and this, in tandem with the very fact that the emphasis is on the impact on the accused's mental processes, undeniably raises the question of the relationship between provocation/loss of self-control and diminished responsibility.

Arguments about this relationship have been rehearsed elsewhere[52] and this is not the place to go over them again in detail. For the present purposes the essential points are that (i) there is no evidence in the law (e.g. the Homicide Act 1957) or in the debates which preceded it that provocation and diminished responsibility should be regarded as mutually exclusive; (ii) the relationship between normal and abnormal people should not be seen as a black or white one. Rather (psychiatrically) normal individuals may exhibit abnormal features in their thinking and/or behaviour, especially if they have been under stress or pressure, and (psychiatrically) abnormal people will show normal characteristics in their thoughts and conduct. Over a period of time all individuals show fluctuating levels of normality and abnormality, without being absolutely normal or abnormal; (iii) treating the relationship between provocation and diminished responsibility as mutually exclusive would breach the principle of fair labelling[53] because those suffering from a mental abnormality and who were provoked to kill would have to choose one or other of them to plead, so that (if the defence succeeded) the verdict would only partially reflect the reality. What matters for the present discussion is that we may call the accused's state of mind abnormal in two quite different ways. It may be abnormal in the sense that it is not that person's normal or usual state of mind (it is abnormal for him or her), or we may describe it as abnormal in the strict psychiatric sense. In either sense the accused's mental processes may have been so disturbed that he/she should not be regarded as wholly responsible for the killing. Thus, the basis on which liability is reduced is one of partial denial of responsibility.

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52 See Ronnie Mackay and Barry Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' [2003] Criminal Law Review 745–59; James Chalmers, 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' [2004] Criminal Law Review 198–212; John Gardner and Timothy Macklem, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell' [2004] Criminal Law Review 213–18; Ronnie Mackay and Barry Mitchell, 'Replacing Provocation: More on a Combined Plea' [2004] Criminal Law Review 219–23; and Barry Mitchell, Ronnie Mackay and Warren Brookbanks, 'Pleading for Provoked Killers: In Defence of *Morgan Smith*' (2008) 124 Law Quarterly Review 675–705.

53 According to the fair (or representative) labelling principle, offences should be defined and labelled so as to reflect the nature and severity of the wrongdoing. Partial defences such as loss of self-control and diminished responsibility are relevant here because they influence the category of the accused's crime. For general discussion of the principle, see for example, Andrew Ashworth, 'The Elasticity of Mens Rea', Tapper (ed.), *Crime, Proof and Punishment* (Butterworths, 1981); Glanville Williams, 'Convictions and Fair Labelling' [1983] Cambridge Law Journal 85; and James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217.

Practical Implications

Viewing provoked killings in the manner that is being contended in this chapter has certain practical implications. Of course, the fact that it is suggested that provocation and diminished responsibility should not be regarded as mutually exclusive pleas also makes us think of the concept, in the American Law Institute's Model Penal Code, of extreme mental or emotional disturbance:

> A homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[54]

Deserving cases are determined by the adjective 'extreme' which, as commentators have quickly pointed out, is ambiguous and carries the risk that it would lead to inconsistent verdicts.[55] However, it is suggested that rather than simply rely on this kind of vague language – and note that another potentially elastic concept, of 'substantial' impairment is retained in the redefinition of diminished responsibility in s. 52(1) Coroners and Justice Act 2009 – it would be more appropriate for the law to permit expert evidence to be adduced as to the accused's thinking, judgement and perceptions so as to provide a clear and reliable picture of his state of mind. That would enable the jury to make an informed assessment of the impact of the provocation/trigger. Whilst this suggestion to adduce more expert evidence may initially be criticised, the fact is that the legal system has to make crucial judgements about serious matters, so that the factual basis on which such judgements are made is extremely important. Some jurors are likely to be able to imagine how they would have reacted in similar circumstances to those that confronted the accused; others quite simply will not. But the issue here is how the law should redefine the subjective requirement in what used to be called provocation. It is therefore absolutely vital that evidence is available of how the defendant reacted to it, evidence which is as accurate and reliable as possible. However much experience of life individual jurors may have had, it surely makes good sense to provide them with expert evidence. This would avoid the need to place total reliance on individual jurors drawing their own conclusions – making their own guesses – and it would thus reduce the danger that different juries would reach different verdicts about the same case.

Placing the emphasis on the reaction in the accused's mind rather than the physical manifestation of it has other potentially controversial implications. One sub-category of cases in which defendants have pleaded 'extreme mental or emotional disturbance' is often known as the 'brooder cases'. A conspicuous feature of these is that the defendant responded to the provocation/trigger in a manner which is the very antithesis of the old provocation plea: instead of a sudden eruption of violence through a visible loss of self-control, the defendant goes away and thinks about it, quite possibly for a matter of days, and carefully decides what to do. This obviously carries a strong implication of revenge, which is traditionally also viewed as the absolute antithesis of a deserving case. But it is implicit in the argument being made in this chapter that excluding undesirable cases of revenge cannot satisfactorily be achieved simply by imposing a time limitation between the trigger and the defendant's physical response to it. Nor can it be properly achieved by assuming that any evidence of premeditation should be fatal to the plea – that would, for example, clearly prejudice the interests

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54 Model Penal Code and Commentaries, s.210(3)(1)(b).

55 See, for example, Law Com. No 304, 2006 (n. 3), para. 5.22. Note, however, that the Commission expressly acknowledged that 'the phrase has formed the basis for a provocation defence in at least some American state jurisdictions, and cannot therefore be dismissed as unworkable'.

of a significant proportion of battered women who kill their abusers, and there clearly seems to be a desire to show sympathy for their predicament. Thus, the partial defence of 'extreme mental or emotional disturbance' has been available in some brooder cases, because the law's attention is on the accused's state of mind more generally, rather than on the immediate object of his/her intent or on how quickly he/she responded to the trigger. (It is perhaps also worth remembering at this point that expert psychiatric or medical evidence is a feature of many 'extreme mental or emotional disturbance' cases.)

Conclusions

It is a statement of the obvious, but nevertheless worth stating, that the task facing law reformers here is a tough one. There clearly are some cases of vengeful killing or premeditated killing which are (almost) universally regarded as meriting no sympathy, but the law needs to adopt a sophisticated approach if it is not to exclude instances where our sympathy is appropriate. That in itself should persuade us to look elsewhere for a solution to the problem. The decision to retain the loss of self-control requirement and place it at the heart of the new law is likely to become regarded as a retrograde step – a lost opportunity at best. What may have happened is that attention was focused on cases which are regarded as unmeritorious and the view was that something had to be incorporated into the law in order to exclude them from the new defence, without at the same time looking carefully at similar situations which deserve less condemnation, and comparing the two. The nature and extent of the criticism of the concept under the old provocation law ought, as the Law Commission recommended, to have signalled its demise. If the label 'provocation' evoked so many bad memories that the new law had to be repackaged, then surely the loss of self-control concept should have gone with it or at least been given a radical rethink. But this is not to imply that it should simply have been relabelled or dressed up in a different guise.

The unavoidable conclusion must be that in the absence of a really significant reinterpretation of the loss of self-control concept, the new law will attract further criticism and be seen as achieving very little by way of genuine reform. Whilst it may well succeed in excluding many unmeritorious cases of considered revenge, it is likely to be of no use to many battered women for precisely the same reasons as the old provocation plea. The removal of the qualifying phrase 'sudden and temporary' is unlikely to have a major impact, certainly not enough to benefit battered women. What is necessary is a more radical rethink. Labelling the defence 'provocation' seems quite appropriate, but the disapprobation heaped on the old law – much of which was justifiable – indicates that decisions about how to define it in the early part of the twenty-first century should not be unduly influenced by its previous incarnations. Any proposed new definition of a defence should of course be tested to see if it would accommodate unmeritorious cases, but the process of reform should begin by thinking about the deserving cases and what it is about them that prompts our sympathy. Unfortunately, loss of self-control is not the answer.